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IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
PATRICK MORRISEY,
Attorney General,

Plaintiff,

v.

CIVIL ACTION NO. 12-C-127
JUDGE STOWERS

NUTRAGENOMICS MFG, LLC,
a Georgia limited liability company; and,
DREW GREEN, individually and as sole organizer
of Nutragenomics Mfg, LLC, a Georgia limited liability company,

Defendants.

FINAL ORDER AND OPINION GRANTING SUMMARY JUDGMENT

This matter came before the Court on December 4, 2014, on the renewed motion of the State of West Virginia ex rel. Patrick Morrissey, Attorney General, to grant summary judgment in favor of the State and against Drew Green ("Defendant").

Prior to the hearing, counsel for Drew Green was permitted to withdraw from representation of Green. Former counsel for Green advised the Court that he had assisted Green prepare responses to the State's First Requests for Admissions, but Green refused to cooperate in preparing responses to interrogatories or requests for production of documents. Green, therefore, was not represented by counsel during the summary judgment hearing and Green was not present for the hearing. Counsel for the State elected to proceed with the hearing. Appearing before the Court was Douglas L. Davis, Assistant Attorney General, on behalf of the State.

Defendant, Nutragenomics MFG, LLC, filed bankruptcy under Chapter 7 of the bankruptcy laws in the United States Bankruptcy Court for the Northern District of Georgia in October 2012, Case No. 12-75325-jem. Nutragenomics's bankruptcy case was closed in August 2014 with no distribution to creditors. Therefore, the State's action against Nutragenomics is moot and the company will be dismissed as a defendant in this matter.

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PUTNAM CO. CIRCUIT COURT

I.
FINDINGS OF FACT

A. Procedural Facts

The State commenced an investigation of the Defendants in early 2012, suspecting the Defendants were engaged in the manufacture and sale of harmful chemicals in violation of the West Virginia Consumer Credit and Protection Act. W. Va. Code § 46A-1-101 et seq. (the "Act"). This action was then commenced in April, 2012.

By entry of an Agreed Order, July 18, 2012, the Defendants agreed to stop business activity in West Virginia, and to provide the State with information regarding its activities among other relief.

On September 7, 2012, Defendant Drew Green entered a plea of guilty to one count of conspiracy to distribute and possess with intent to distribute a Schedule I controlled substance in violation of 21 U.S.C. § 846 and 841(b)(1)(c), in the United States District Court Western District of Louisiana, Lafayette Division, in United States v. Drew T. Green, Docket No. 12-00146-02. Green is scheduled to be sentenced December 15, 2014. During his guilty plea hearing, Green admitted that he conspired with Nutragenomics and others to sell analogues of controlled substances nationwide in violation of federal law and received more than \$10 million from the sales.

By virtue of that Agreed Order entered by the Court on July 12, 2013, Green was permanently enjoined from doing any business in the state.

B. Substantive Facts

The Defendants, Nutragenomics and Green, manufactured, advertised and sold harmful chemicals that were specifically designed, whether used alone or combined with common household substances, to mimic the effects of controlled substance such marijuana. These chemicals are sold as "incense," "plant food," and "potpourri." All of these drugs are harmful to humans which is why, in part, the drugs are controlled substances under Schedule I of the federal criminal laws. 21 U.S.C. § 801.

The Defendants sold and marketed these harmful chemicals to West Virginians via the Internet and telephone. Pursuant to the Agreed Order entered by the Court July 18, 2012, Defendants produced the names and contact information for 35 of their West Virginia customers, comprising 79 separate sales transactions.

The Defendants disingenuously advertised that the synthetic cannabinoids they sold were not for human consumption. However, during Green's guilty plea hearing in federal court, he admitted that the synthetic analogues were intended for human consumption, to get people high. Green also admitted this in his responses to the State's First Request for Admissions, response 19.

Green admitted in his responses the State's Request for Admissions that the products contained sold in West Virginia contained the same chemicals that are dangerous and harmful Schedule I drugs under federal laws. Admissions responses 14-16. The State complained that the harmful nature of these products was not disclosed to prospective customers. Green admitted this. Admissions response 23. Green admitted products sold by the Defendants were labeled "not for human consumption" while marketing them for that specific purpose. Admissions

response 26. Green also admitted he had knowledge or was aware of how the Defendants' products were being marketed. Admissions response 30.

Green admitted during his plea hearing that products sold throughout the country that were labelled as "incense" or "potpourri" were packaged to be intentionally misleading as to what was in the product and what the product's intended use was. He admits the intended use was to "get high."

Accordingly, this Court finds that the products sold by Defendants in West Virginia are dangerous and harmful to humans if consumed. In so ruling, this Court notes its concern for the health and welfare of the adult and juvenile citizens of this State who could come into contact with these dangerous substances.

For the foregoing reasons, this Court finds there is no genuine issue of any material fact and this matter may be decided as a matter of law. Green admits the operative facts.

II. CONCLUSIONS OF LAW

Summary judgment is appropriate when there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. *Reed v. Orme*, 655 S.E.2d 83, Syl. pt. 2 (W. Va. 2007). If the record taken as a whole cannot lead a rational trier of fact to find for the nonmoving party, summary judgment must be granted. *Parker v. Estate of Bealer*, 656 S.E.2d 129, 132 (W. Va. 2007) (quoting *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329, 338 (1995)(quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-8 (1986))).

Although the Court must view the facts and all permissible inferences from them in the light most favorable to the nonmoving party, that party must nonetheless offer some concrete evidence from which a reasonable fact finder could return a verdict in its favor. *Painter v. Peavy*, 451 S.E.2d 755, 759 (W. Va. 1994), (citing *Anderson v. Liberty Lobby, Inc. supra*). If it does not, the court should grant the motion for summary judgment. Motions for summary judgment are appropriate in consumer protection cases when there is no genuine issue of material fact. See, e.g., *State ex rel. McGraw v. Imperial Marketing*, 506 S.E.2d 799 (W. Va. 1998) (upholding summary judgment for the Attorney General in a consumer case); *U.S. Life Credit Corp. v. Wilson*, 301 S.E.2d 169 (W. Va. 1982) (remanding for entry of summary judgment for consumer).

A. Judgment Is Appropriate

Green admits misrepresentations and omissions about the Defendants' products were made. The misrepresentations and omissions violate the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-6-104, which prohibits "unfair or deceptive acts or practices in the conduct of trade or commerce." "Trade" or "commerce" is defined to mean "the advertising, offering for sale, sale or distribution of any goods or services and shall include any trade or commerce, directly or indirectly, affecting the people of this state." W. Va. Code § 46A-6-102(6).

Since no genuine issue of material fact exists, summary judgment is appropriate.

B. Green Admits the State's Causes of Action

Unfair methods of competition and unfair or deceptive acts or practices
in the conduct of any trade or commerce are hereby declared unlawful.

W. Va. Code § 46A-6-104. Green admits the Defendants' products contained harmful and dangerous chemicals, but i) failed to disclose this to consumers; ii) mislead consumers as to the content of the products and what they were used for; and iii) caused the likelihood of misunderstanding and confusion by selling mislabeled products, all in violation of the Consumer Protection Act. W. Va. Code § 46A-6-104 as defined by W. Va. Code § 46A-6-102(E), (L) and (M).

Misrepresentations

Under the Act,

"Unfair methods of competition and unfair or deceptive acts or practices" means and includes, but is not limited to, any one or more of the following:

(E) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;

...

(L) Engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding;

...

(M) The act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, whether or not any person has in fact been misled, deceived or damaged thereby . . .

W. Va. Code § 46A-6-102(7)(E), (L) and (M).

Green admits selling products that are harmful and dangerous but he failed to disclose this to consumers in violation of the Consumer Protection Act. W. Va. Code § 46A-6-102(7) (M). He admitted the Defendants sold these products in West Virginia. Admissions response 16.

During his guilty plea hearing, Green admitted the products Defendants sold were labelled as "incense" and "potpourri," Guilty plea transcript, pp. 21-22. He also admitted during his guilty plea hearing that the packaging "was designed to be intentionally misleading as to both what was in the product and what the product's intended use was." *Id.* Under the Consumer Protection Act, Representing that goods have ingredients, uses, or benefits that they do not have is an unfair or deceptive act or practice. W. Va. Code § 46A-6-102(7)(E). The products that Defendants sold did not have the ingredients, uses, benefits or characteristics of incense or potpourri as labelled by Defendants. Simply put, the Green's conduct was unfair and deceptive.

Green admitted the chemicals were sold to customers ultimately to be ingested or smoked to "get high." Admissions response 19. Green admits the chemicals were mislabeled, claiming they were not for human consumption when that is exactly what they were intended for. Admissions response 26. Defendants' actions and misrepresentations likely caused misunderstanding and confusion among consumers. W. Va. Code §§ 46A-6-104 and 46A-6-102(7)(L).

C. Equitable Relief Is Appropriate.

1. Permanent Injunction and Civil Penalties are Required.

The primary relief available in a suit by the State under the Act is equitable in nature. West Virginia Code § 46A-7-108 authorizes the Attorney General to bring a civil action "to restrain a person from violating [the Act] and for other appropriate relief." *State ex rel. McGraw v. Imperial Marketing*, 506 S.E.2d 799, 809-810 (W. Va. 1998). Thus, this Court will order Green to pay restitution for the purchases disclosed to the State. Green denies that several drugs sold to West Virginians contained ingredients for which he pled guilty of distributing in his criminal proceeding. The State calculates restitution for sales to 35 West Virginians as being \$18,357.54 (total sales of \$19,876.54 less \$1,519 in sales of products not containing admitted substances).

2. Civil Penalties Are Appropriate.

This Court also will impose civil penalties against the Defendants pursuant to W. Va. Code § 46A-7-111(2) for the Defendants' willful and repeated violations of the Consumer Protection Act. The Court is authorized to impose civil penalties in the amount up to \$5,000 per violation. W. Va. Code § 46A-7-111(2). The State has requested a maximum fine of \$5,000 be imposed for each of the 75 of 79 transactions admitted to by the Defendants. The State contends one \$5,000.00 penalty per transaction is appropriate.

In consideration of the pleadings, motions, supporting memoranda, admissions, submitted documents and affidavits, and arguments of counsel, this Court hereby grants the State's motion; and further

ORDERS that the State's complaint against Nutrigenomics MFG, LLC is dismissed as moot; and further

ORDERS that Drew Green is **permanently enjoined and restrained** from engaging in unfair and deceptive acts or practices in violation of the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-1-101 et seq.; and further

ORDERS that judgment is entered in favor of the State and against Drew Green in the amount of **\$375,000.00 in civil penalties** for his willful and repeated violations of the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-7-111(2). These civil penalties represent one \$5,000.00 civil penalty for each of 75 of the 79 sales transactions with West Virginia consumers which included admittedly harmful or dangerous chemicals; and further

ORDERS that judgment is entered in favor of the State and against Drew Green in the amount of **\$18,357.54 for restitution**; and further

ORDERS that in the event the State collects all or any part of this judgment, the State shall seek further directions and orders from the Court as to the disposition of any and all such funds before any funds are disbursed.

The objections and exceptions of aggrieved parties are hereby noted and preserved.

The Clerk is directed to send a certified copy of this Order to counsel of record and to Drew Green at his last known address as follows:

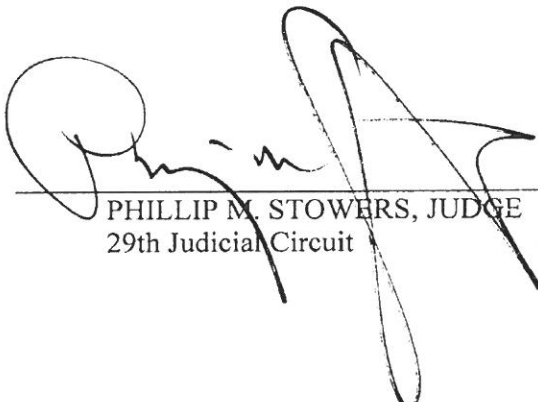
Douglas L. Davis
Assistant Attorney General
Consumer Protection/Antitrust Division
Post Office Box 1789
Charleston, WV 25326-1789

Drew Green
2660 Holcomb Bridge Road
Suite 200
Alpharetta, GA 30022

This matter is hereby dismissed from the Court's active docket subject to being reinstated in the event the State collects all or any part of the judgment.

IT IS SO ORDERED

Date: December 10, 2014



PHILLIP M. STOWERS, JUDGE
29th Judicial Circuit

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12/15/14

cc:
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